Supreme Court, U. S.
FILED
DEC 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-779

IN RE:

PHILIP A. GILLIS,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PHILIP A. GILLIS prays that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Sixth Circuit entered June 24, 1977, striking petitioner's name from the roll of attorneys admitted to practice before that Court.

OPINION BELOW

The opinion and order of the Court of Appeals is unreported. It is reproduced as Appendix "A", infra.

JURISDICTION

The order sought to be reviewed was entered June 24, 1977. Petitioner was granted leave to file a motion for rehearing out of time which was denied on September 8, 1977, Appendix "B", infra. Jurisdiction is conferred upon this Court by 28 USC 1254.

QUESTIONS PRESENTED FOR REVIEW

I.

DOES EITHER THE DUE PROCESS CLAUSE OR RULE 46 OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRE THAT, BEFORE A COURT OF APPEALS ENTERS AN ORDER OF DISBARMENT, IT GRANT THE ATTORNEY A HEARING WHICH HE HAS TIMELY REQUESTED?

II.

DOES THE DUE PROCESS CLAUSE FORBID A COURT OF APPEALS FROM TAKING DISCIPLINARY ACTION AGAINST AN ATTORNEY ON THE BASIS OF A CRIMINAL CONVICTION WHICH THE ATTORNEY UNSUCCESSFULLY APPEALED TO THAT COURT WHEN THE COURT DOES NOT TAKE DISCIPLINARY ACTION AGAINST OTHER ATTORNEYS WHO HAVE BEEN CONVICTED OF THE SAME OFFENSE BUT WHO HAVE NOT APPEALED THEIR CONVICTION?

III.

SHOULD AN ATTORNEY BE PERMANENTLY DISBARRED UPON HIS CONVICTION OF FAILURE TO FILE AN INCOME TAX RETURN AT THE TIME REQUIRED BY LAW IN VIOLATION OF 26 USC 7203?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF APPELLATE PROCEDURE INVOLVED

The United States Constitution, Amendment V, provides in part:

> No person shall . . . be deprived of life, liberty, or personal property, without due process of law . . .

Rule 46 of the *Federal Rules of Appellate Procedure* provides in part:

> (b) *Suspension or Disbarment*. When it is shown to the the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.
>
> *(c) Disciplinary Power of the Court Over Attorneys*. The court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

STATEMENT OF THE CASE

Petitioner was convicted of having willfully failed to file at the time required by law his personal income tax return for the year 1970. He appealed to the Court of Appeals for the Sixth Circuit which affirmed his conviction without opinion on July 8, 1976. 538 F2d 330. This Court denied certiorari on December 13, 1976 (50 L Ed 2d 625, No. 76-455).

On January 18, 1977, the Court of Appeals entered an order reciting the fact of conviction and directing petitioner to show cause why his name should not be stricken from the roll of attorneys admitted to practice before the Court. Petitioner filed a response on February 2, 1977, addressing each of the issues tendered by this petition, with a request for a hearing before the Court pursuant to Rule 46 FRAP.

The Court of Appeals denied petitioner a hearing but did set the case for a fifteen minute oral argument on June 16, 1977.[1]

Upon consideration of petitioner's written response to the Order to Show Cause, the Court of Appeals ordered his name stricken from the roll of attorneys admitted to practice before the Court.

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[1] Under circumstances substantially set out in the Court of Appeals order, Appendix "A", infra, petitioner's counsel waived the 15 minutes' oral argument, but at no time did he waive the hearing which he requested under Rule 46.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was entitled to an evidentiary hearing.

First of all, it must be made clear that petitioner was never granted his requested evidentiary hearing. In its Order of Disbarment, the Court below recited that the cause was set for hearing on June 16. But this is not so.

This case was set for oral argument only. The notice from the Court makes this clear.

> The above-styled case is set for oral argument on THURSDAY, JUNE 16, 1977 in the Court Room of the United States Court of Appeals, U.S. Post Office and Courthouse, Fifth and Walnut Streets, Cincinnati, Ohio.
>
> Please report to the Clerk's Office, Room 516 no later than 8:45 A.M. The Court convenes at 9:00 A.M., Eastern Standard Time.
>
> The Court directs that oral argument be limited to not more than FIFTEEN (15) minutes on each [sic] side.

In denying petitioner a hearing, the Court was in irreconcilable conflict with the Seventh Circuit rule enunciated in *In Re Ming*, 469 F2d 1352 (1972). *Ming* involved review of a District Court disbarment, and so Rule 46 FRAP was not implicated. The decision turned upon the due process clause.

> Extenuating circumstances tending toward a minimization of the penalty very probably would require a hearing for proper development. Recently, in a case of parole revocation, the

Supreme Court held that the parolee had a right to a hearing, with minimum due process requirements, including the opportunity to be heard in person and to present evidence and to confront and cross-examine adverse witnesses [citation]. While in a hearing on a suspension, based on a finalized conviction of a misdemeanor, an attorney may not be allowed to reargue the merits of the conviction, he would seem to have similar interests to those of the parolee, or a person being sentenced for a crime, to some hearing under due process. In such a situation, "a chance to respond" must be equated to "the opportunity to be heard" which necessarily implies a hearing.

In Re Ruffalo, 390 US 544 (1968), turned upon whether the attorney had been given proper notice, but the Court did say, at page 550, that an opportunity for explanation and defense is a requirement of due process. Compare *Turco* v *Monroe County Bar Association*, 554 F2d 515 (CA 2 1977).

See also *In Re Lewis*, 389 Mich 668; 209 NW2d 203 (1973) and 394 Mich 224; 229 NW2d 316 (1975). In the first opinion the Court interpreted Michigan's specific provision for disciplining an attorney convicted of a crime. Of this provision, the Court said, 389 Mich at 676:

> The convicted attorney must be given an opportunity to explain in detail those mitigating factors and circumstances which might cause the Board not to exercise its discretionary power to act under this Section. Without such a hearing and individualized judgment, the discretion of the Board in this context has no substantial basis upon which to stand.

Due process to one side, the plain language of Rule 46 FRAP requires the Court to grant a hearing upon request. The hearing surely must include more than an audience before the Court limited to 15 minutes of oral argument.

II.

Petitioner should not be disciplined as a direct result of having prosecuted an appeal from his criminal conviction.

The disciplinary proceedings against petitioner were initiated by the Court *sua sponte*. Unquestionably, the Court had the right to do this in fulfillment of its obligation to see that only morally and professionally fit individuals are allowed to represent the public before the Court.

However, as petitioner asserted in his response to the order to show cause, the Court has not acted against attorneys convicted of the same offense who have allowed their convictions to rest at the District Court level. When neither the Court, an independent bar association, or some other investigative agency does more than search the records of the appellate court for evidence of conviction of crime by an attorney, the court is offering solid discouragement to a lawyer to challenge his conviction.

No court may make an appeal so costly to a litigant. *North Carolina* v *Pearce*, 395 US 711; *Blackledge* v *Perry*, 417 US 21 (1974).

III.

Disbarment is too severe a sanction.

Petitioner's conviction was a misdemeanor which did not involve moral turpitude; did not require a proof of an intent to evade or defeat the tax; and did not require proof of any evil motive or bad purpose. *United States* v *Hawk*, 497 F2d 365 (CA 9 1974); *United States* v *Pohlman*, 522 F2d 974 (CA 8 1975); *United States* v *McCorkle*, 511 F2d 482 (CA 7 1975); and *United States* v *Pandilidis*, 524 F2d 644, 649-50 (CA 6 1975).

Rule 46 FRAP sets out the standards by which an attorney's fitness to practice in a Court of Appeals is measured. There has been little federal litigation interpreting this rule or predecessor standards of conduct. See, for example, the annotation at 63 ALR 3rd, *Federal Income Tax Conviction as Involving Moral Turpitude Warranting Disciplinary Action Against Attorney*. Not a single Federal case is cited. This case could afford the Court an opportunity to define the obligations of the Federal courts in disciplinary proceedings.

The precise issue raised here — whether a conviction for failure to file standing alone is grounds to discipline a lawyer — was before the California Supreme Court in *In Re Fahey*, 505 P2d 1369; 63 ALR3d 465. The Court held that, absent aggravating circumstances, the mere fact of conviction was not grounds for discipline:

> Such a conviction does not establish moral turpitude on its face. Thus respondent is subject to discipline only if his moral turpitude is established by special circumstances that are not necessarily present whenever the offense is committed.
> 505 P 2d at 1373; 63 ALR3d at 471

The Court below cited no basis for discipline other than the fact of conviction. Petitioner was not allowed to show the truth of the allegations in his return to the Order to Show Cause that his returns were filed and taxes paid, including $2,000 to apply against interest and penalties, before the intelligence agents ever approached him; that he was truthful in all respects with the intelligence agents; and that he stipulated to the basic facts of prosecution so as to avoid burdening the Court with a lengthy trial.

Rather than burden this Court with extensive citations of sometimes conflicting State court decisions, we invite the Court to the decisions of those states comprising the Sixth Circuit. *Kentucky State Bar* v *McAfee*, 301 SW2d 899 (Ky 1957) [Tax Evasion]; and *Cincinnati Bar Association* v *Leroux*, 242 NE2d 347 (Ohio 1968). [Failure to file].

The Michigan case of *In Re Lewis, supra*, [Failure to file] was under a unique Michigan rule rather than the general standards of the American Bar Association. Even there the discipline imposed was suspension and not disbarment.

RELIEF REQUESTED

For the foregoing reasons, petitioner prays that his Petition for Certiorari be granted either for plenary review of the questions tendered or in the alternative to vacate the order below and remand the case to the Court of Appeals with directions to afford him the hearing to which he is entitled under Rule 46 FRAP. A hearing before a single judge of the Court with the record, at petitioner's expense, to go to the full Court would be satisfactory.

Respectfully submitted,

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APPENDIX A

ORDER

(United States Court of Appeals
For the Sixth Circuit)

No. 77-9003

(Filed June 24, 1977)

In Re Philip A. Gillis

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

On July 8, 1976, this Court affirmed the conviction of Philip A. Gillis of the Michigan Bar for failure to file an income tax return for the year 1970 in violation of 26 U.S.C. §7203 (1970). This Court denied a petition for rehearing on August 17, 1976. The Supreme Court denied certiorari on December 13, 1976. 45 U.S.L.W. 3428.

On January 18, 1977 this Court filed an order directing Respondent Mr. Philip A. Gillis of Detroit, Michigan to show cause why his name should not be stricken from the roll of attorneys admitted to practice before this Court. Mr. Gillis' answer to this show cause order was filed February 2, 1977, with a request for a hearing before this Court in compliance with Rule 46c F.R.A.P.

The cause was set for hearing in open court on June 16, 1977.

Respondent informed this Court by letter dated May 23, 1977, that it would be impossible for him to appear

for the reason that he had some two months previously scheduled a two-week trip to Italy, with a departure date on June 10, 1977, and requested that oral argument be rescheduled for a date prior to June 10, or after June 24, 1977. Acting upon his request this Court rescheduled said hearing for the October 1977 term of the Court, conditioned upon Respondent's agreeing to a suspension from practice before this Court until the Court shall determine the cause.

On June 13, 1977, this Court received a letter dated June 10, 1977, from Respondent declining to accept the suspension, with a request that the matter be considered without oral argument or, in the alternative, that Mr. John Louisell appear on his behalf. Accordingly, Mr. Louisell was notified to appear, but requested that the matter be submitted on Respondent's Answer to Show Cause.

Upon consideration of the written response, the Court concludes that the said Philip A. Gillis has failed to show good cause why his name should not be stricken from the roll of attorneys admitted to practice before this Court.

Accordingly, it is ORDERED that the name of Philip A. Gillis be and hereby is stricken from the roll of attorneys admitted to practice before this Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

No. 77-9003

(Filed September 8, 1977)

United States of America, Plaintiff-Appellee v. Philip A. Gillis, Defendant-Appellant.

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

Upon consideration of Respondent's motion for rehearing of order denying leave to file motion for rehearing out of time and suggestion for rehearing en banc, said motion for leave to file motion for rehearing out of time be and hereby is granted.

Appellant further having filed a petition for rehearing en banc and affirmative vote of a majority of the active judges of the Court not having been received in favor thereof, the petition has been referred to the panel which heard the original appeal.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk